



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2012-0169; FRL-9745-5]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Deferral for CO₂ Emissions from Bioenergy and other Biogenic Sources Under the Prevention of Significant Deterioration Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Virginia Department of Environmental Quality (VADEQ) on December 14, 2011. This revision defers until July 21, 2014 the application of the Prevention of Significant Deterioration (PSD) permitting requirements to biogenic carbon dioxide (CO₂) emissions from bioenergy and other biogenic stationary sources in the Commonwealth of Virginia. This action is being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on [insert date 30 days from date of publication].

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2012-0169. All documents in the docket are listed in the www.regulations.gov website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection

Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: David Talley, (215) 814-2117, or by e-mail at talley.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Throughout this document, whenever “we,” “us,” or “our” is used, we mean EPA. On April 18, 2012, (77 FR 23178), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of a revision to the Virginia SIP which would defer until July 21, 2014 the application of PSD permitting requirements to biogenic CO₂ emissions from bioenergy and other biogenic stationary sources in the commonwealth of Virginia. Other specific requirements of Virginia’s SIP revision and the rationale for EPA’s proposed action are explained in the NPR and will not be restated here. The formal SIP revision was submitted by VADEQ on December 14, 2011.

II. Summary of SIP Revision

EPA incorporated the biomass deferral into the regulations governing state programs and into the Federal PSD program by amending the definition of “subject to regulation” under 40 CFR 51.166 and 52.21 respectively. Virginia has adopted this same approach. The SIP revision incorporates the Biomass Deferral into Virginia’s PSD program by amending the definition of “subject to regulation” under 9VAC5-85-50C. The language adopted by Virginia mirrors the language in the Federal regulations. EPA last took action on these provisions on May 13, 2011

(76 FR 27898). In addition to the incorporation of the Biomass Deferral, the SIP revision makes a minor, clarifying revision to 9VAC5-85-50B.

III. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) Are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law. On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by Federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .” The opinion

concludes that “[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General’s January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.” Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. EPA's Response to Comments Received on the Proposed Action

EPA received two sets of timely public comments. Both sets were supportive of our proposed action, and are included in the docket. While it is not generally our practice to respond to specific comments when those comments are in support of a proposed action, one of the submitted comments contained some factual inaccuracies which we feel should be addressed and corrected for the record. One commenter wrote in closing: "Because the PSD provisions of the Biomass Deferral have already been incorporated into Virginia's SIP and approved by EPA in 2011, the current 2012 proposed SIP revisions incorporate the Title V provisions of the Biomass Deferral through (*sic*) amendments to 9VAC5 Chapter 85, Permits For Stationary Sources of Pollutants Subject to Regulation, Part II - Federal (Title V) Operating Permit Actions. We agree with EPA's conclusion that the proposed Title V amendments to Virginia's SIP are consistent with federal requirements and should therefore be approved as proposed." EPA did not "incorporate the PSD provisions of the Biomass Deferral into Virginia's SIP in 2011." Indeed, as we stated in our notice of proposed rulemaking and reiterated earlier, the purpose of the present rulemaking action is to incorporate the Biomass Deferral provisions into the Virginia SIP. It is not clear to which 2011 action the commenter is referring. On May 13, 2011, EPA took final action to approve the Tailoring Rule provisions into the Virginia SIP (76 FR 27898). However, the Biomass Deferral is a separate rulemaking action and was not addressed at that time. Furthermore, as we stated in our notice of proposed rulemaking, the present rulemaking action does not address the title V provisions of the Biomass Deferral, and addresses only Virginia's PSD program (*See*, 77 FR 23179, Footnote No.1).

V. Final Action

EPA is approving the revisions to 9VAC5-85-50 into the Virginia SIP.

VI. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in

the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action pertaining to GHG permitting under Virginia's PSD program may not be challenged later in proceedings to enforce its requirements (See section 307(b)(2)).

List of Subjects in 40 CFR part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: October 10, 2012

W.C. Early, Acting
Regional Administrator,
Region III.

40 CFR Part 52 is amended as follows:

PART 52 - [AMENDED]

1. The authority citation for 40 CFR part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart VV--Virginia

2. In § 52.2420, the table in paragraph (c) is amended by revising the entry for Chapter 85,

Section 5-85-50 to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-Approved Virginia Regulations and Statutes

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * *	* * *			
9 VAC 5, Chapter 85	Permits for Stationary Sources of Pollutants Subject to Regulation			
* * * *	* * *			
Part III	Prevention of Significant Deterioration Permit Actions			
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5-85-50	Definitions	11/9/11	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Revised definition of “subject to regulation”
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[FR Doc. 2012-26539 Filed 10/29/2012 at 8:45 am; Publication Date: 10/30/2012]